



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-91-14

FACTS:

You are a member of the General Court. You plan to establish a business known as the Company. The Company will conduct seminars on government relations for small and medium sized businesses. The seminars will, for a fee, teach business leaders how to participate in and monitor public policy decision-making that affects them at both the federal and state levels of government. The seminars will focus on timely public policy issues which concern business leaders.

You would serve as the principal in the Company, which will be organized as a corporation. You would become the majority stockholder. You anticipate that the Company will have four other associates, each of whom will also own an equity interest in the Company. Depending on the terms of the financing arrangements, you anticipate that your equity interest in the Company would either be 50%, if a bank loan is required, or 28%, if outside investors are sought. Similarly, your four associates would each own either 12.5% or 7%, depending on the terms of the financing arrangements. Your spouse and your current Administrative Assistant would be among the four associates. You have informed us that you will not permit your Administrative Assistant to work for the Company during the business hours when he is otherwise working as a state employee.

Most of the anticipated seminars and consulting activity will relate to the federal government and issues of national policy or international trade. Most federal government seminars will be held in Washington, D.C. Some seminars will focus on government decision-making at the state level. Of these, some state level programs will focus on public policy issues in Massachusetts. In such instances, you would not personally discuss specific legislation which may be pending before the General Court, although other seminar panelists may do so. Furthermore, if a client or seminar participant were to request the Company's services on legislative matters or matters pending before Massachusetts state agencies, the Company would decline to represent that client. That client would instead be referred to another appropriate source.

Seminar participants will receive a notebook containing information on how to communicate with executive branch agencies, the Congress, or the specified state legislature, how to track legislation and regulatory action, how to plan a lobbying strategy, and sources for further assistance on specific problems. Participants will learn about professional lobbyists, in-house government relations offices, and government relation efforts that can be undertaken by corporate managers and employees.

The Company will also be available to assist clients on a consulting basis in resolving specific issues faced by the client in its government relations. Assistance in preparing a lobbying strategy or in hiring a lobbyist or government affairs representative are also possible activities. The Company could serve as a consultant to government relations firms to refer clients as appropriate when services are needed for specific activities.

The Company does not expect to solicit contracts from any state agency for seminars or any other services. It is possible, however, that seminar participants may work for businesses which have state contracts. The Company will pay seminar speakers travel expenses and/or honoraria for their participation.

Seminar registrants are expected to be key business people. While legislative agents registered at the federal or state levels may be asked to serve as speakers or panelists at the seminars,

they are not generally expected to be among those who would register as clients or seminar participants. However, the Company intends to make a good faith effort through its registration procedure to seek disclosure from all registrants if they have any direct financial interest in specific issues being considered by the Massachusetts legislature. Any such disclosures will be retained for at least three years as part of the Company's corporate records.

At no time will the Company use state facilities for its seminars except as may be available for rental on a competitive basis to all other businesses and organizations. For example, you would consider renting the Great Hall for a State House reception after usual business hours. You may also consider renting conference facilities at public colleges or the state archives.

You have requested guidance as to how the Massachusetts conflict of interest law, G.L. c. 268A, would affect your proposed business. You have included a copy of your Company's Business Profile for our review.

QUESTION:

May a member of the General Court own and operate the seminar/consulting company described above within the confines of the conflict of interest law?

ANSWER:

Yes, but only subject to certain conditions, the most restrictive of which prohibits the Company from any activity involving Massachusetts legislative matters.

DISCUSSION:

1. Jurisdiction

As a member of the General Court, you are a state employee for purposes of the conflict of interest law, G.L. c. 268A. See, e.g. EC-COI-89-35; 89-8. Your administrative assistant would also be a state employee. As such, several provisions of c. 268A would apply to you, your administrative assistant, and, potentially, to your proposed Company. You should also be aware that, because your Company might have dealings with legislative agents,¹ you may want to discuss your proposed business with the Office of the Secretary of State, the state agency which regulates legislative agents and lobbyists. Finally, to the extent that any issues might arise under G.L. c. 55, the campaign finance law, you should also seek advice from the Office of Campaign and Political Finance.

2. The Conflict of Interest Law Applicable to You

(a) Section 3

Section 3(b) of c. 268A prohibits a state employee from directly or indirectly receiving anything of "substantial value" (\$50 or more) from anyone for or because of any official act² performed or to be performed by the state employee, unless otherwise provided by law for the proper discharge of his official duty. See, e.g. Free Passes Advisory No. 8; In the Matter of George Michael, 1981 SEC 59; In the Matter of Charles F. Flaherty, 1990 SEC 498. This section prohibits, among other things, gifts intended to foster "good will" for future acts or gifts intended as a "thank you" for acts which have already been performed. A reciprocal provision prohibits a donor from giving anything of substantial value. G.L. c. 268A, s.3(a).

While this section does not prohibit your proposed business venture because your Company would be providing a service in exchange for a fee, we can conceive of certain circumstances where questions might arise. For example, seminar registrant or a client has a direct interest in legislation pending before the General Court or one of your legislative Committees, and if the payment of a fee by that registrant or

client were for services not actually contemplated or rendered (or for services rendered but which were significantly disproportionate to the size of the fee) an inference could arise that the fee was nothing more than an effort to circumvent the restrictions of s.3. As Advisory No. 8 makes clear:

"[W]here there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use their authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that that public official's influence could benefit the giver. [Citation omitted]. In such a case, the gratuity is given for as yet unidentified 'acts to be performed.'"

We would point out that the registrant or client need not be a legislative agent or lobbyist to create the issue of a gift.³ Anyone with an interest, or a foreseeable interest, in Massachusetts legislation might create s.3 issues in the circumstances described. You should bear in mind that this inference could arise even where the client has purchased services which involve issues or laws which are wholly unrelated to matters before the Massachusetts legislature. (See s.23(b)(1), below, for a discussion on matters related to the Massachusetts legislature.) The critical question under this section is whether the person you are doing business with has, or foreseeably could have, an interest in legislation at the time that the services are purchased from your Company. If so, the inference of a gift could arise.⁴ See also s.23(b)(3), below.

We note that one of the steps that your Company will undertake is a written disclosure by registrants concerning any interest which they may have in pending legislation. That good faith inquiry could help you to avoid questions arising under this section. Those disclosures should, at a minimum, be made available for public inspection during normal operating hours. Further, in order to later avoid other issues arising under this section, we would urge your Company to consider adopting a policy which would fully refund all registration fees to any registrant who is unable to attend a seminar for any reason if, to your knowledge, he or she has any interest in pending legislation or in matters before your legislative Committees. Of course, accurate and complete corporate records are essential and would serve as your best protection.

(b) Section 4

Section 4 of c. 268A prohibits a state employee from acting as an agent or attorney for, or receiving compensation⁵ directly or indirectly from, anyone other than the Commonwealth in connection with any particular matter⁶ in which the Commonwealth is a party or in which it has a direct and substantial interest.

A member of the General Court is not subject to the above restriction, except that no such member shall personally appear for any compensation other than his legislative salary before any state agency, unless:

- (1) the particular matter before the state agency is ministerial in nature;
- (2) the appearance is before a court of the Commonwealth; or
- (3) the appearance is in a quasijudicial proceeding.

For purposes of this section, ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents. Further, for the purposes of this section, a proceeding shall be considered quasijudicial if:

- (1) the action of the state agency is adjudicatory in nature; and
- (2) the action of the state agency is appealable to the courts; and
- (3) both sides are entitled to representation by counsel and such counsel is neither the attorney

general nor counsel for the state agency conducting the proceeding. See, e.g. EC-COI-89-31; 86-15; 85-82; 79-68.

The above legislator's exemption would appear to alleviate most concerns for you as long as you do not personally appear⁷ before state agencies in connection with particular matters in which the Commonwealth is a party or in which it has a direct and substantial interest.

You should note, however, that the above exemption applies only to legislators. Section 4 could still restrict certain activities of your administrative assistant in his role as an employee of the Company. For example, he could not receive income or fees in connection with a seminar on how to lobby the Massachusetts Department of Environmental Protection in a given application or proceeding pending before that agency.

(c) Section 6

Section 6 of c. 268A prohibits a state employee from participating⁸ in a particular matter in which to his knowledge he, his immediate family⁹ or partner, a business organization in which he is serving as officer, director, trustee, partner, or employee, or any person with whom he is negotiating or has any arrangement concerning prospective employment, has a direct or a reasonably foreseeable financial interest. See, e.g. EC-COI-83-43; 86-15; 89-19; 90-17.

This section would prohibit you from acting as a legislator on special legislation which could affect the Company or one of your Company's clients. Note that the definition of "particular matter" specifically excludes the enactment of general legislation. See EC-COI-89-8; 90-17. In addition, s.6A requires that you make and file a full written disclosure with this Commission if you are required to knowingly take any action as a legislator which would substantially affect your own financial interests, unless the affect is no greater than the effect on the general public. See EC-COI-86-15; 83-43. This disclosure is required regardless of whether the matter in question is special or general legislation.

(d) Section 7

Section 7 of c. 268A prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency, unless an exemption applies. See, e.g. EC-COI-84-108; 85-3; 89-31; 90-17; see also *Conley v. Ipswich*, 352 Mass. 201 (1967) (addressing s.20 - the reciprocal municipal section). This section would prohibit you or your Company from, among other things, contracting with any state agency to provide consulting or other services, or to lease facilities, equipment, etc., in the conduct of your business. For example, your proposed plan to lease the Great Hall or other state facilities would be prohibited even if the space is available to others under the same conditions or circumstances. No exemption would appear to be available to you. See, e.g. EC-COI-84-109; 91-2. Section 7(c) does permit certain exemptions for members of the General Court who own less than 10% of the stock of a corporation. In light of your proposed ownership interest in the Company, however, you would not be eligible for this de minimis exception. See EC-COI-90-17.

On the other hand, even though the Company may have clients who are state vendors, you would not necessarily have a financial interest in that contract. As long as your arrangement with the client is independent of any contract the client has with a state agency, you would not violate s.7. EC-COI-90-17.

(e) Section 23

There are four parts of s.23 which are pertinent to your question.

First, s.23(b)(1) of c. 268A prohibits a state employee from accepting employment involving compensation of substantial value (\$50 or more), the responsibilities of which are inherently incompatible with the responsibilities of his public office. Whenever your company provides consulting or other services

to a paying client, you are engaged in employment within the meaning of this section. See, e.g. EC-COI-84-93.

We find that this section will prohibit your Company from conducting seminars or providing consulting services on any matters which involve the Massachusetts legislature. It would be inappropriate for you or your associates, for example, to advise clients or seminar participants on how to receive some advantage or favorable treatment before the legislature, or how to lobby colleagues, while you continued to serve in that body. See, e.g. In the Matter of Adam DiPasquale, 1985 SEC 239 (the private activity necessarily impaired the public employee's independence of judgment in the performance of his official duties); see also 84-93 (attorney's consulting services necessarily impaired his independence of judgment); 81-151 (in carrying out his official state responsibilities, the state employee must be free to exercise independent judgment and must maintain his loyalty solely to the interests of the Commonwealth. By accepting employment from certain private employers, a potential for the impairment of independence of judgment can arise which can call into question the credibility of the employee's state work); Cf. EC-COI-89-30 (services were not inherently incompatible).

We find that a Massachusetts legislator cannot properly give private advice to a paying client about Massachusetts legislative matters without also impairing his independent legislative judgment.¹⁰ As a state legislator, your private business activities would be inherently incompatible with your public duties whenever those activities involve Massachusetts legislative matters.¹¹ Consequently, in order to avoid the potential for divided loyalty, your Company must refrain from involvement with all Massachusetts legislative matters. We also find that this section would prohibit your Company from referring such matters to other appropriate sources for the same reasons.

While s.23(b)(1) will not prohibit you from providing services on matters which are not connected to the Massachusetts legislature (for example - seminars on federal agencies or legislation, or seminars involving states other than Massachusetts), if a particular client has an interest in Massachusetts legislation, issues under s.23(b)(3) can still arise. See below.

Second, s.23(b)(2) of c. 268A prohibits a state employee from using or attempting to use his official position to secure for himself or others unwarranted privileges of substantial value (\$50 or more) and which are not properly available to similarly situated individuals. This section would prohibit the use of state time, facilities, personnel, or equipment in the conduct of your business. EC-COI-83-43; 91-6; 91-7. To comply with s.23(b)(2), you must conduct your Company's business entirely outside of state time and without the use of state resources. You must also refrain from using your state title or office in any way in an effort to solicit business for the Company. See EC-COI-84-127; 89-30; 89-31. This section would, of course, also apply to your administrative assistant and anyone else working for the Company who is also a public employee.

Third, s.23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public, the facts which would otherwise lead to such a conclusion. In effect, this section prohibits the creation of even an "appearance" of a conflict of interest. See EC-COI-91-2.

Given your role as a state legislator, and given your proposed business venture concerning the rendering of advice on how to conduct business with the government, questions under this section might arise for you. Accordingly, it would be appropriate for you to make a full public disclosure to this Commission and/or the House Clerk concerning your proposed business venture prior to beginning operation. That disclosure will dispel any appearance of a conflict arising under s.23(b)(3). See, e.g. EC-COI-90-17.

In addition, issues under this section can arise in specific situations. For example, if your Company is providing consulting services to a person who also happens to have an interest in a matter pending before the Massachusetts legislature, an appearance of a conflict will arise because of the dual public/private relationship. A full public disclosure would be warranted under the circumstances to dispel any appearance of a conflict of interest.¹² Alternatively, you could abstain as a legislator on those matters which are pending.

Further, this Commission recently held that a legislator who has private business dealings with someone over whom he also exercises authority as a state employee, violates this section unless he has first made a full public disclosure of the dual relationship. In the Matter of George Keverian, 1990 SEC 460. In the present case, because your administrative assistant will also have private financial dealings with you through the Company, it is advisable for you to make an additional public disclosure to this Commission and/or the House Clerk.

Fourth, s.23(c) of c. 268A prohibits a state employee from disclosing confidential information which he has acquired through his public position. Confidential information is any information which cannot be obtained through a public records request pursuant to G.L. c. 4 and c. 66. See, e.g. EC-COI-89-30; 90-6.

Finally, you should also be aware that another section of c. 268A might also apply to the conduct of a private business where former state employees are involved (s.5). Although nothing in your opinion request raises an issue under that section at this time, you should be aware that s.5(e) will restrict any lobbying activities before the legislature which might later be conducted by you for a period of one-year from the time that you leave state service.

3. Conclusion

In summary, although nothing in the conflict of interest law will prohibit you from conducting the proposed business for matters other than those involving the Massachusetts legislature, certain strict guidelines must be kept in mind. The Commission does not, however, express any opinion as to the wisdom of your proposed course of conduct, or as to your Company's ability to maintain compliance with each of the provisions of c. 268A. Cf. EC-COI-91-1 (footnote 5).

These guidelines are intended solely as a broad outline of the types of issues which may arise under c. 268A from time to time. You should renew your opinion request whenever a specific fact situation arises which is not adequately addressed by the guidelines set forth herein. You should also renew your opinion request whenever you anticipate that a material change will affect the structure or mission of your proposed consulting business.

Date Authorized: September 11, 1991

¹ "Legislative agent" means any person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor's approval or veto thereof or to influence the decision of any member of the executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule of regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and not simply incidental thereof, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services. G.L. c. 268B, s. 1(k).

² "Official act," any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A S.1(h).

³ Where a legislative agent is involved, issues might also arise under G.L. c. 268B, s.6. That section prohibits gifts of \$100 or more per calendar year made by legislative agency and which are given to a public employee. Note also that c. 268B has certain reporting requirements. G.L. c. 268B, s.5.

⁴Cf. {Commission Advisory No. 2} (Guidelines for Legislators Accepting Expenses and Fees for Speaking Engagements) ("[t]he critical question when a legislator receives expenses or fees is whether these items were either for, or made necessary by, the speaking engagement, or whether the speaking engagement was merely a pretext for an improper benefit or gratuity."

(Emphasis added). Advisory No. 2 lists several criteria for determining when an honorarium will be considered "legitimate" as opposed to a pretext to circumvent s.3. In order to be considered legitimate, the speaking engagement must be: (i) a formally scheduled event, (ii) scheduled in advance of the legislator's arrival, (iii) before an organization which would normally have outside speakers, and (iv) significant to the event (that is, not perfunctory).

While none of these criteria are directly relevant to your particular business, they should provide you with an insight into when an inference of wrongdoing could arise under s.3. If you are uncertain about any aspect of how s.3 applies to a specific fact situation, you should renew your opinion request to this Commission.

⁵ "Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, s. 1(a).

⁶ "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, s.1(k).

⁷ See EC-COI-87-27 (personally appearing includes any contract with any agency, whether written or oral, with the intent to influence).

⁸ "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, s.1(j).

⁹ "Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, s.1(e).

¹⁰ Although matters which are pending before Massachusetts executive branch agencies would not be inherently incompatible with your responsibilities as a state legislator, your Company must exercise caution whenever such matters are discussed. Executive branch matters may, at times, foreseeably implicate your legislative duties.

¹¹ We recognize that legislators may, in exchange for an honorarium, address private parties about pending legislation. See {Commission Advisory No. 2}. Speaking engagements are an inherent part of a legislator's official duties. We must, however, distinguish such engagements from services which, for a fee, are being offered privately by someone who is also a member of the general court. Your private business cannot be considered a part of your official duties as a legislator.

¹² To be explicit, we would find that the appearance issue arises whenever your Company provides any type of service to someone who also happens to have an interest in a matter pending before the legislature, even though the services which your Company would be providing are wholly unrelated to that pending matter. The appearance arises as a result of the dual, albeit permissible, public/private relationship. On the other hand, s.23(b)(1) would outright prohibit your Company from providing services to anyone if those services involve Massachusetts legislative matters. See *supra*.